

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ASSOCIATED BUILDERS AND
CONTRACTORS, SAGINAW VALLEY
AREA CHAPTER,

Plaintiff-Appellant,
v

Supreme Court No. 124835
Court of Appeals No. 234037

DIRECTOR OF THE MICHIGAN
DEPARTMENT OF CONSUMER &
INDUSTRY SERVICES and MIDLAND
COUNTY PROSECUTING ATTORNEY,

Midland County Circuit Court
Case No. 00-2512-CL

Defendants-Appellees,
and

MICHIGAN STATE BUILDING &
CONSTRUCTION TRADES COUNCIL, et al.

Intervenors/Defendants-Appellees,
and

SAGINAW COUNTY PROSECUTING ATTORNEY,

Intervenor/Appellee. _____ /

**DEFENDANT-APPELLEE, DIRECTOR OF THE
MICHIGAN DEPARTMENT OF CONSUMER
AND INDUSTRY SERVICES', REPLY BRIEF**

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Dated: November 16, 2004

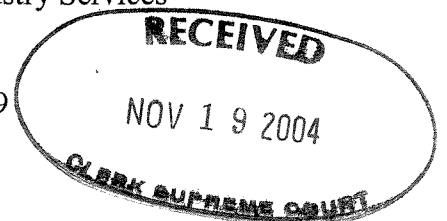


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INTRODUCTION

On September 17, 2004, this Court issued an order inviting all parties to file supplemental briefs by October 15, 2004. All parties accepted the invitation and timely filed supplemental briefs. Plaintiff-Appellant (Plaintiff), Associated Builders and Contractors, Saginaw Valley Area Chapter (ABC), however, decided that its 17 page supplemental brief with two attachments was not adequate and filed on November 4, 2004 a new 24 page reply brief with seven attachments. Defendant-Appellee (State Defendant), Director of the Michigan Department of Consumer & Industry Services (now Department of Labor & Economic Growth), files this reply brief in response to the new brief filed by Plaintiff.

ARGUMENT

I. No actionable case or controversy exists in this case.

When the rhetoric in Plaintiff's November 4, 2004 reply brief is stripped away, all that remains is the claim that because ABC's members, at their discretion, may be subject to the Prevailing Wage Act (PWA), 1965 PA 166, MCL 408.551 *et seq*, they are harmed by the Act's provisions. The harm, according to Plaintiff, is that they must comply with the Act which requires ABC and its members to pay to their employees the "prevailing wage and fringe benefits rates" (MCL 408.552) on eligible state projects, to post those rates "on the construction site" (MCL 408.555) and keep accurate records of "the actual wages and benefits paid" to each employee. (*Id.*) Because they believe that the PWA "restricts competition and runs counter to the basic element of the free enterprise system." (Goulet Affidavit, ¶ 5.) ABC argues that the Prevailing Wage Act is unconstitutional. In other words, they don't like the law and they don't like the way it is administered.

In *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608, 622-623; 684 NW2d 800 (2004), this Court recognized that a party who contests the manner in which the executive branch administers a law lacks standing to challenge the law in court:

If there is dispute over the manner in which the Governor is enforcing or administering a law, such dispute, in the normal course, must be resolved through the executive process. If there are citizens who believe the Governor is wrongfully or inadequately enforcing or administering the state's consumer protection or occupational safety or worker's compensation or revenue laws, it is their right to petition or lobby the Governor in order to alter these policies. It is also the right of such citizens to petition or lobby the Legislature in order to cause them to alter these laws. Finally, of course, it is the right of citizens to participate in the channels of public debate, and in the political processes, in order to influence public policies, or to place in public office persons who more accommodating to their points of view. Unless there is an individual who has personally been injured by the Governor's enforcement or administration of these laws, it is not normally the role of the judicial branch to monitor the work of the executive and determine whether it is carrying out its responsibilities in an acceptable fashion. [Emphasis added.]

Here, Plaintiff and its members could make the same claims regarding the wisdom and the administration of, for example, the Elliott-Larsen Civil Rights Act or the Minimum Wage Law of 1964, 1964 PA 154, MCL 408.381 *et seq.* The pertinent inquiry is not whether these laws are administered adequately by the executive branch. Rather, the issue is whether ABC has "sustained or is immediately in danger of sustaining some direct injury as the result of ... enforcement... [of the PWA.]" *National Wildlife Federation*, 471 at 616, quoting *Massachusetts v Melon*, 262 US 447, 487-489; 43 S Ct 597; 67 L Ed 2d 1078 (1923).

In this case, Plaintiff lacks standing. It continues to only present generalized, vague hypotheticals which fail to set forth any injury-in-fact to ABC or its members. For these reasons, the Application for Leave to Appeal should be denied.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Defendant-Appellee, Director of the Michigan Department of Consumer and Industry Services, respectfully requests this Honorable Court to enter its Order denying the Application for Leave to Appeal.

Respectfully submitted,

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cases/00/2000056812C/reply brief

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PROOF OF SERVICE

Chery Goff, being first duly sworn, deposes and says that on November 16, 2004 she served a copy of Defendant-Appellee, Director of the Michigan Department of Consumer and Industry Services', Reply Brief upon the following parties by depositing same in a United States mail depository in Lansing, Michigan, enclosed in an envelope bearing postage, fully prepaid, plainly addressed as follows:

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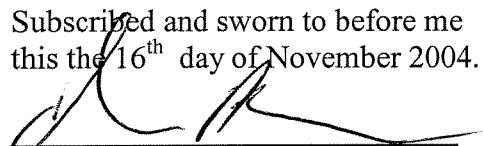
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Chery Goff

Subscribed and sworn to before me
this the 16th day of November 2004.


Cherie A. Richie, Notary Public
Ingham County, MI
My Commission Expires: 4-13-08